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Supreme Court of the United States

October Term, 1974

No. 75-112

JAMES SALER,
Petitioner,

vs.

RALPH KREIGER, Sheriff,
Cuyahoga County,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 9

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Interpretation of This Court's Opinion in Neil v. Biggers, 409 U.S. 188 (1972) 9

II. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court 14

III. The Decisions Below Conflict in Principle With Applicable Decisions of This Court 16

A. The Decision Below Conflicts in Principle With the Court's Decision in *Townsend v. Sain*, 372 U.S. 293 (1963) 17

B. The Decision Below Conflicts in Principle With the Court's Decision in *Neil v. Biggers*, 409 U.S. 188 (1972) 18

Conclusion 19

APPENDIX:

A. Journal Entry of the Cuyahoga County Juvenile Court A1

B. Opinion of the Court of Common Pleas A3

C. Opinion and Journal Entry of the Court of Appeals A7

D. Entry Denying Motion for Reconsideration by the Court of Appeals A13
E. Orders of Supreme Court of Ohio Denying Leave to Appeal A14
F. Order of Supreme Court of Ohio Denying Motion for Reconsideration A15
G. Order of the United States Supreme Court Denying Stay Pending Petition for Certiorari A16
H. Memorandum Opinion and Order of District Court A17
I. Order of the United States Court of Appeals for the Sixth Circuit A35
J. Title 28, United States Code, Section 2254(d) A36

TABLE OF AUTHORITIES

Cases

Commissioner v. Bilder, 369 U.S. 499 (1962) 13
Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970) 18
Crooker v. California, 357 U.S. 433 (1958) 17
Federal Trade Commission v. Travelers Health Association, 362 U.S. 293 (1960) 16
Gilbert v. California, 388 U.S. 263 (1967) 14, 15
Kirby v. Illinois, 406 U.S. 682 (1972) 14, 15, 16, 18
Linkletter v. Walker, 381 U.S. 618 (1965) 13
Neil v. Biggers, 409 U.S. 188 (1972) 3, 9, 10, 12, 13, 18, 19
People v. Anderson, 389 Mich. 155 (1973) 15
People v. Hallaway, 389 Mich. 265 (1973) 15
Securities and Exchange Commission v. United Benefit Life Insurance Company, 387 U.S. 202 (1967) 16

Smith v. Coiner, 473 F.2d 877 (4th Cir. 1973), *cert. den.*, 414 U.S. 1115 ..... 11, 13
Speiser v. Randall, 357 U.S. 513 (1958) 13
Stanley v. Cox, 486 F.2d 48 (4th Cir. 1973), *cert. den.*, 416 U.S. 958 11
State v. Lathan, 30 Ohio St. 2d 92, 282 N.E.2d 574 (1972) 18
Stovall v. Denno, 388 U.S. 293 (1967) 3, 10, 11, 12, 13, 19
Thompson v. Louisville, 362 U.S. 199 (1960) 17
Townsend v. Sain, 372 U.S. 293 (1963) 17
United States v. Calamaro, 354 U.S. 351 (1957) 13
United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975), *cert. den.*, ... U.S. 12
United States ex rel. Thomas v. New Jersey, 472 F.2d 735 (3rd Cir. 1973), *cert. den.*, 414 U.S. 378 13
United States ex rel. Trignani v. Russell, 405 F.2d 1119 (3rd Cir. 1968) 18
United States v. Wade, 388 U.S. 218 (1967) 14, 15, 16
Upshaw v. United States, 335 U.S. 410 (1948) 17
Wilkinson v. United States, 365 U.S. 399 (1961) 17

Statutes and Rules

Ohio Revised Code:

Section 2901.13 4
Section 2905.01 4
Section 2905.44 4

Rules of the Supreme Court of the United States:

Rule 19(1) 13, 16, 17

United States Code, Title 28:

Section 1254(1) 2
Section 2254 4
Section 2254(d) 3

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
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The petitioner, James Saler, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on April 23, 1975.

At the time of the initiation of the instant *habeas corpus* proceeding in the Federal District Court, petitioner was in the constructive custody of Ralph Kreiger, Sheriff of Cuyahoga County, State of Ohio. Pursuant to the order

of the District Court, petitioner was admitted to the Ohio State Reformatory to begin serving his sentence, imposed by the state trial court, in the custody of A. R. White, Superintendent of the Ohio State Reformatory. Petitioner has remained in such custody to the present time.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not reported, appears as Appendix I. The memorandum, opinion and order of the United States District Court, Northern District of Ohio, Eastern Division, is reproduced as Appendix H.

The orders of the Supreme Court of Ohio appear as Appendices E and F. The opinion and orders of the Court of Appeals, Cuyahoga County, Ohio, are reproduced as Appendices C and D. The opinion of the Cuyahoga County, Ohio, Court of Common Pleas, appears as Appendix B. The order of the Cuyahoga County, Ohio, Juvenile Court is reproduced as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 23, 1975, and this Petition for a Writ of Certiorari was filed timely within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether testimony of an in-court identification of the accused must be excluded from evidence unless the prosecution proves by clear and convincing evidence that such in-court testimony is of a source independent of unnecessarily suggestive pre-trial identification procedures conducted by law enforcement officers subsequent to this Court's decisions in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Stovall v. Denno*, 388 U.S. 293 (1967).

2. Whether an accused is entitled as a matter of Constitutional law to the assistance of counsel with the onset of the adversary criminal process, although the law enforcement agency elects to delay the initiation of any formal judicial proceeding.

3. Whether a Federal District Court must grant an evidentiary hearing in a *habeas corpus* case arising from a state court conviction, when the transcript of proceedings had in the state trial court indicates that the trial court may not have applied the correct constitutional standards in disposing of the defendant's claims.

4. Whether in-court identification testimony must be excluded from evidence when the totality of circumstances surrounding the occurrence of the alleged criminal conduct and the unnecessarily suggestive pre-trial identification procedures render the in-court identification testimony unreliable.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28, United States Code, §2254 (d), are reproduced as Appendix J.

STATEMENT OF THE CASE

Basis of Federal Jurisdiction

Petitioner, pursuant to Title 28, United States Code, §2254, filed his petition for writ of *habeas corpus* in the United States District Court, Northern District of Ohio, Eastern Division, challenging his state court convictions for armed robbery, sodomy and rape. The petitioner prays this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals, for the Sixth Circuit, affirming the District Court's denial of the petition for writ of *habeas corpus*.

History of Proceedings

On April 13, 1972, petitioner was convicted in the Court of Common Pleas, County of Cuyahoga, State of Ohio, for violation of Ohio Revised Code Sections 2901.13, 2905.01, and 2905.44, prohibiting, respectively, armed robbery, rape and sodomy. Petitioner was sentenced to the Ohio State Reformatory for terms in accordance with the relevant statutes, all sentences to run concurrently (Docket entry of May 8, 1972). Ohio Revised Code Sections 2901.13 (armed robbery), 2905.01 (rape) and 2905.44 (sodomy) provide the following respective sentences: 10-25 years, 3-20 years, and 1-20 years.

The Court of Appeals for Cuyahoga County affirmed the conviction and sentence, and the Supreme Court of Ohio dismissed petitioner's appeal on the ground that it raised no substantial constitutional question. The petitioner is of tender years and frail physical characteristics. Because his commitment to a penal institution pending ultimate reversal of his convictions would have resulted in irreparable harm, petitioner applied to Mr. Justice Stew-

art for an indefinite stay of execution of sentence pending the timely filing and determination of a petition for writ of certiorari. On November 13, 1973, Mr. Justice Stewart denied petitioner's application, and thereafter no petition for writ of certiorari was filed.

In November, 1973, petitioner filed his petition for writ of *habeas corpus* in the United States District Court, Northern District of Ohio, Eastern Division. On June 20, 1974, without a hearing, the District Court issued its memorandum opinion and order denying the writ of *habeas corpus*, and the District Court, on July 8, 1974, denied petitioner's application for a certificate of probable cause.

Petitioner, on July 8, 1974, filed his "Notice of Appeal" from the order of the District Court, and the Sixth Circuit Court of Appeals granted petitioner's motion for a certificate of probable cause on August 14, 1974. That court entered its decision affirming the judgment of the District Court on April 23, 1975. The Appellate Court, in its opinion, did not specifically address itself to each issue presented on behalf of the petitioner in the written and oral arguments to the court.

Petitioner is incarcerated at the Ohio State Reformatory.

Statement of Facts

At about 5:30 p.m., on July 30, 1971 (Tr. 179),[1] petitioner, a minor fifteen years of age, and William Patton, also fifteen years of age, proceeded down a path near the Superior-Detroit Bridge, Cleveland, which led to the area known as the Cleveland "flats" (Tr. 322-325). A man accosted them and, without explanation, threatened

1. The symbol "Tr. ....." refers to pages of the transcript of proceedings had in the state trial court.

to hit them with a long pipe that he held unless the youths accompanied him to the Sunoco gas station at the top of the path (Tr. 326).

Upon arriving at the gas station, a second man (Tr. 328), Mr. Ferren (Tr. 174), searched each youth, and forcibly seized a pocket knife and several photographs from Patton (Tr. 175, 327). Though the youths inquired why they were being detained, no explanation was forthcoming (Tr. 329).

Ferren called the police (Tr. 168), and two patrolmen arrived in response to the call (Tr. 169). Upon arrival, the police found the youths to be nervous and frightened (Tr. 227-228). The police searched the youths (Tr. 334), and then transported them to Central Police Station (Tr. 335). After arriving at the station, the patrolmen conferred with two policewomen (Tr. 234), and then placed the youths in Room 108 of Central Police Station (Tr. 237, 288, 335), where they sat for some time (Tr. 337).

The police telephoned the victim of a rape, sodomy, and armed robbery that had occurred July 16, 1971 in the same area where the boys were accosted on July 30, 1971 (Tr. 208, 238). Policewoman Bilinovich told the victim, Miss Margaret Hill, that the police "had two suspects in custody" (Tr. 137, 208, 238), and asked Miss Hill to come down to Central Police Station (Tr. 139).

Upon arriving at the police station, Miss Hill first saw the two patrolmen who had rendered her assistance two weeks earlier, after the criminal acts had occurred (Tr. 139). Miss Hill was then met by Policewoman Bilinovich (Tr. 289), who told Hill that they had two suspects in custody, and wanted her to "walk by" and "look at them" to see "if she could identify them" (Tr. 142, 208, 238, 257).

The two patrolmen and two policewomen accompanied Hill into Room 108 (Tr. 143, 237, 239, 258). In addition to the two boys, the only other persons present in the room were police employees (Tr. 238, 239, 258, 290). Petitioner did not have his parents or counsel present (Tr. 238, 239, 259, 290, 339). The confrontation was conducted despite the absence of any police or law enforcement emergency, and without the customary line-up procedure (Tr. 290). After being in the room with the police and the two boys for about 10 minutes (Tr. 338), Hill identified petitioner as one of her assailants (Tr. 240, 258, 290), but was unable to positively identify Patton (Tr. 240). Miss Hill made this identification even though on cross-examination she could not state any distinguishing characteristics, or otherwise explain how she was able to identify the petitioner (Tr. 144).

After conducting this identification in Room 108, both patrolmen and the two policewomen took Hill and the petitioner, but not Patton, to the Detective Bureau located in the Police Station (Tr. 145, 339). The petitioner's mother arrived and was also taken to the Detective Bureau (Tr. 340). The petitioner and his mother were seated at a long table (Tr. 146, 340). While face to face with the defendant, Hill recounted the rape, sodomy, and armed robbery episode that occurred on July 16 (Tr. 261, 340). After about an hour of being together with the petitioner, and in the midst of the police in the Detective Bureau, Hill became "emphatic about her identification of Saler" (Tr. 262), as one of her assailants (Tr. 55-62).

At trial, when policewoman Bilinovich was asked why no lineup was arranged, she testified that she was "aware of the policy of the Juvenile Court that they do not hold lineups for children when you bring them in off the street" (Tr. 290).

The criminal conduct complained of took place between about 5:15 p.m. and 5:45 p.m. (Tr. 121), in the area of the Cleveland flats near the same, previously recited, Sunoco gas station, on July 16th, which was a clear day (Tr. 55-56). In fear of her life, Margaret Hill was the victim of rape, sodomy and armed robbery (Tr. 61, 100). Miss Hill was so emotionally upset (Tr. 212) that she was uncertain as to what exactly each of her assailants was saying or doing (Tr. 94, 98, 100, 112, 120). Following the incident, the police drove Miss Hill to St. Vincent Charity Hospital, where the treating physician ordered Miss Hill a sedative, which was administered intramuscularly (Tr. 33, 133). Miss Hill was able to give the police only a very general description of her assailants: they were white males, between 12 and 15 years of age, one was dark-haired and the other blond-haired (Tr. 113-115, 205, 214-215).

Even though Miss Hill had been very emotionally upset, and unable to give a detailed description of either of her assailants, she positively identified the assailant in open court (Tr. 58), and in answer to the court's question, stated that such identification was based upon her observations of July 16th, and not the out-of-court confrontations of July 30th (Tr. 160). However, the prosecution made no effort to establish that the in-court identification was independent of the pre-trial confrontation.

During the trial Miss Hill testified that the petitioner was the same height and weight as was her assailant on July 16, 1971 (Tr. 149). However, the defendant was three inches taller and almost 40 pounds heavier at the trial than he was at the time the crimes were committed (Tr. 554, Exhibits G and H).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE INTERPRETATION OF THIS COURT'S OPINION IN NEIL V. BIGGERS, 409 U.S. 188 (1972).

In *Neil v. Biggers*, 409 U.S. 188, 198-199 (1972) this Court stated:

> "What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to petitioner, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process. *Clemons v. United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1251 (1968) (Leventhal, J., concurring); cf. *Gilbert v. California*, 388 U.S. 263, 273, 87 S. Ct. 1951, 1957, 18 L. Ed. 2d 1178 (1967); *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury."

The District Court in the instant case properly ruled that the pre-trial identification procedures were unnecessarily suggestive. Appendix H, pp. A29-A30, A34. Furthermore, such procedures and petitioner's trial (both occurring during 1972) post-dated the decision in *Stovall v. Denno*, 388 U.S. 293 (1967). Notwithstanding such findings, the District Court assessed the unnecessary pre-trial procedures in light of the totality of circumstances to determine whether the procedures were conducive to a very substantial likelihood of irreparable misidentification. Appendix H, page A31.

The Appellate Court below held that the decision of the District Court is in accord with this Court's ruling in *Neil v. Biggers, supra*. Appendix I. Thus, the Court of Appeals rejected petitioner's argument to the contrary, namely, if pre-trial suggestive identification procedures and the trial of the defendant occur *after* the date *Stovall* was decided, then due process requires the exclusion of testimony concerning the out-of-court identification: whether a *defendant can prove* that, notwithstanding such procedures, the identification is "reliable" under the totality of circumstances is irrelevant.

The Sixth Circuit's decision below is in conflict with the decision on the same matter of the United States Court of Appeals, for the Fourth Circuit:

> "The recent decision of the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), in our view, has no application to this case. In *Neil*, the rule was stated that the admissibility of an identification obtained as a result of a suggestive confrontation was to be determined by the likelihood of misidentification, in short, by its reliability, *taking into account the totality of the circumstances surrounding the making of the identification*. The *Neil* rule,

as the opinion makes clear (at 198, 93 S.Ct. 375), applies to pre-*Stovall* cases since police officers, prosecutors and other law enforcement officers were not then aware that 'suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.' (at 199, 93 S.Ct. at 382). In contrast, in post-*Stovall* cases, of which the instant case is one, the rule to be applied is the *Stovall* rule, i.e., *whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to a denial of due process of law.* In post-*Stovall* cases, '[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.' (at 198, 93 S.Ct. at 382). The shift in emphasis from unnecessarily suggestive confrontations (post-*Stovall* cases) to reliability of identification (pre-*Stovall* cases) is explained by the need, once *Stovall* was decided, 'to deter the police from using a less reliable procedure where a more reliable one may be available.' (At 199, 93 S.Ct. at 382)." *Smith v. Coiner*, 473 F.2d 877, 882 (4th Cir. 1973), *cert. den.*, 414 U.S. 1115. (Emphasis supplied).

Thus, the Fourth Circuit has decided that in post-*Stovall* cases, the occurrence of unnecessarily suggestive pre-trial identification procedures compels the exclusion of testimony concerning the out-of-court identification.[2]

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2. In *Stanley v. Cox*, 486 F.2d 48 (4th Cir. 1973), *cert. den.*, 416 U.S. 958, the Fourth Circuit specifically concluded that the pre-trial show-up was held promptly after the commission of a crime ("fresh memories"), and, therefore, was *not unnecessarily* suggestive. Thus, in accordance with *Smith v. Coiner, supra*, the identification testimony was not to be excluded from evidence.

The foregoing decision of the Fourth Circuit also is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit. That court, in *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975), *cert. den.*, ... U.S. ....., as did the appellate court below, concluded that the *Neil* test of reliability was the applicable constitutional standard notwithstanding that unnecessarily suggestive pre-trial identification procedures were conducted subsequent to this Court's decision in *Stovall*. The Seventh Circuit reached such decision notwithstanding its conclusion that the arguments in favor of an exclusionary rule, which would deter the police from conducting a show-up when a line-up is feasible, carry substantial force:

> The reliability of the trial process "in its search for truth" would be enhanced; the danger of convicting the innocent and the serious risk of a miscarriage of justice would be minimized; the burden of judicial review of the particular circumstances of each of the multitude of cases in which eyewitness identifications are challenged may be lessened significantly; and the room left for considerable judicial disagreement due to the somewhat illusive standards for determining when an identification is sufficiently reliable would be greatly diminished. *United States ex rel. Kirby v. Sturges, supra*, 510 F.2d at 405-406.

The finder of fact at trial is apt to reach different verdicts depending on whether the *Neil* or *Stovall* rule is applicable to a given case. For application of the *Stovall* rule requires consideration of the totality of circumstances surrounding only the *pre-trial, out-of-court confrontation procedures,* and a determination of whether such procedures are *unnecessarily suggestive.* Consideration of the circumstances surrounding the *identification of the witness at the time the criminal conduct occurred,* and a determination of the *reliability* of the identification,

though relevant under the *Neil* rule, are irrelevant under the *Stovall* rule. *Smith v. Coiner, supra.*

Furthermore, the exclusion of testimony concerning the out-of-court identification requires the exclusion of testimony of an in-court identification unless the state proves by clear and convincing evidence that such in-court testimony is of a source independent of the unlawful pre-trial procedures. See, e.g., *United States ex rel. Thomas v. New Jersey,* 472 F.2d 735, 739 (3rd Cir. 1973), *cert. den.,* 414 U.S. 878.

Thus, under the *Neil* rule the defendant is required to prove that the pre-trial procedures were conducive to an unreliable identification, notwithstanding the suggestive pre-trial procedures. However, under the *Stovall* rule the burden is on the state to prove by clear and convincing evidence that the in-court identification was of a source independent of the pre-trial procedures; and, "where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

The granting of the writ of *certiorari* would enable this Court to settle the direct conflict that has developed over a most troublesome question in the administration of justice, and to ensure that a defendant receives equal justice through application of the same standards of constitutional law regardless of his place of trial. Title 28 U.S.C., Rules of the Supreme Court of the United States, Rule 19(1). See, e.g., *Linkletter v. Walker,* 381 U.S. 618, 620 (1965); *Commissioner v. Bilder,* 369 U.S. 499, 501 (1962); *United States v. Calamaro,* 354 U.S. 351, 354 (1957).

II

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

In upholding the District Court's decision, the Court of Appeals below rejected petitioner's contention that, in accordance with this Court's decisions in *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Kirby v. Illinois*, 406 U.S. 682 (1972), the petitioner was denied his right to counsel at the pre-trial identification procedures.

In *United States v. Wade*, 388 U.S. 218, 240 (1967), this Court held that absence of counsel at a pre-trial confrontation renders a courtroom identification inadmissible unless the state proves by clear and convincing evidence that the courtroom identification is of an independent source. The Court then held in *Gilbert v. California*, 388 U.S. 263, 273 (1967), that testimony at trial of the illegal *out-of-court confrontation* is *per se* inadmissible, and the state is not entitled to prove that such testimony has an independent source.

Following its decision in *Gilbert*, the Court concluded that the right to counsel attaches only at the time that judicial adversary proceedings have been initiated. *Kirby v. Illinois*, 406 U.S. 682 (1972). Although the plurality decision in *Kirby* refers to the initiation of "judicial" proceedings, this court further noted that it is the commencement of the adversary process that gives rise to the right to counsel:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself

> to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.* at 689-690.

Thus, although the adversary process generally may coincide with the onset of a judicial proceeding, it is unclear whether it is the commencement of the adversary process, or the ability to label such process a "judicial" proceeding, that gives rise to the right to counsel. If the right to counsel hinges on whether adversary proceedings are initiated by a judicial rather than a law enforcement official, judicial involvement would often be purposefully delayed or avoided, while zealous law enforcement officers attempted to construct a strong case for prosecution.

Furthermore, the Court's decision in *Kirby* appears to have limited application of the *per se* rule announced in *Gilbert*, to such time as when the adversary process has been initiated. *Id.* at 690. The decision does not appear to encompass or limit specifically the Court's holding in *Wade*. For *Wade* is designed to insure the reliability of identifications; the *per se Gilbert* rule is designed to control police conduct without regard to the reliability of identifications. See, *People v. Hallaway*, 389 Mich. 265 (1973); *People v. Anderson*, 389 Mich. 155 (1973).

Petitioner urges this Court to settle and clarify the answers to the questions of federal law left unsettled by its decision in *Kirby v. Illinois, supra*, namely, the nature of the criminal adversary process to which a defendant's

constitutional right to counsel attaches; and the limitation, if any, that the decision in *Kirby* places upon the right to counsel as set forth in the Court's holding in *Wade*. Title 28 U.S.C., Rules of the Supreme Court of the United States, Rule 19(1). See, e.g., *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 297 (1960); *Securities and Exchange Commission v. United Benefit Life Insurance Company*, 387 U.S. 202, 207 (1967).

Such questions are directly presented in the instant case. The police arrested the defendant and obtained a positive identification from the victim-witness that the police had the right boy. However, the police proceeded to subject the petitioner to a further face-to-face confrontation for one hour with the victim-witness, and had the victim relive the criminal conduct and reinforce her identification. The instant pre-trial procedures were a police effort to insure successful prosecution; not one of mere investigation. The adverse positions of the state and boy solidified, and the petitioner was entitled to the presence of counsel at the time the police determined to proceed with the hour-long ordeal. Moreover, the failure of the state to prove that the in-court identification was of a source independent of the pre-trial confrontation rendered the receipt into evidence of the in-court identification a violation of due process.

III

THE DECISIONS BELOW CONFLICT IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT.

To prevent gross miscarriages of justice, this Court has granted review where the federal court below has decided substantial due process questions "in a way in conflict with applicable decisions of this Court." Title 28 U.S.C., Rules of the Supreme Court of the United States,

Rule 19(1); *Crooker v. California*, 357 U.S. 433, 434 (1958); *Thompson v. Louisville*, 362 U.S. 199, 203 (1960); *Upshaw v. United States*, 335 U.S. 410 (1948); *Wilkinson v. United States*, 365 U.S. 399, 401 (1961).

The appellate court below misapplied applicable decisions of this Court to the instant case in failing to grant the petitioner an evidentiary hearing and in concluding that the identification testimony was reliable.

A. The Decision Below Conflicts in Principle With the Court's Decision in Townsend v. Sain, 372 U.S. 293 (1963).

In affirming the District Court's denial of the writ for *habeas corpus*, the Court of Appeals below rejected petitioner's contentions that an evidentiary hearing was compelled in the *habeas* proceeding, although the court did not specifically address itself to such contentions. In *Townsend v. Sain*, 372 U.S. 293 (1963) the Court held that if it is unclear whether the state trial court applied the correct constitutional standards in disposing of a defendant's claims, an evidentiary hearing is compelled. For, under such circumstances the federal district court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trial court may rest upon an error of law rather than an adverse determination of facts, a hearing is compelled.

The state trial court found that the instant in-court identification was "independent" of the suggestive confrontation (Tr. 729-730). However, the transcript of proceedings had in the state trial court fails to indicate whether the trial court correctly applied the proper standard of federal law, to-wit: Whether the state proved by clear and convincing evidence the independence of the

in-court identification. Thus, an evidentiary hearing is compelled.

Furthermore, the decision of the state trial court predated this Court's decisions in *Kirby v. Illinois*, 406 U.S. 682 (1972) and *Neil v. Biggers*, 409 U.S. 188 (1972). At the time of the state court's ruling, a defendant in an Ohio criminal proceeding had the right to the assistance of counsel at a pre-trial confrontation whether or not such confrontation preceded formal judicial proceedings. See, e.g., *State v. Lathan*, 30 Ohio St. 2d 92, 282 N.E.2d 574 (1972).

Thus, in concluding that the in-court testimony was "independent" of the pre-trial procedures (Tr. 730), the state trial court may have limited its conclusion solely to the issue of petitioner's right to counsel. Therefore, regardless of the test applicable to determine the admissibility of in-court identification testimony, the state trial court may have never ruled upon petitioner's claims of violations of due process grounded upon the unnecessarily suggestive pre-trial procedures. See *Cooper v. Picard*, 428 F.2d 1351, n.2 (1st Cir. 1970); *United States ex rel. Trignani v. Russell*, 405 F.2d 1119 (3rd Cir. 1968).

Petitioner is entitled to an evidentiary hearing on the issue of whether the state trial court erred in receiving into evidence the in-court identification testimony—the only evidence legally sufficient to connect the petitioner to the crimes charged. Appendix H, pp. A21-A22.

B. The Decision Below Conflicts in Principle With the Court's Decision in Neil v. Biggers, 409 U.S. 188 (1972).

Even assuming, although petitioner denies, that the admissibility of the in-court identification evidence is to

be assessed in terms of the "reliability" of such identification, *ante*, p. 9, the Court of Appeals below erroneously affirmed the District Court's conclusion that the identification was reliable.

CONCLUSION

The decisions of the Court of Appeals for the Sixth and Seventh Circuits are in direct conflict with the decisions of the Fourth Circuit as to the interpretation of this Court's decisions in *Stovall v. Denno*, 388 U.S. 293 (1967) and *Neil v. Biggers*, 409 U.S. 188 (1972). Uniform application of constitutionally compelled standards of due process of law is necessary to prevent inequality of justice based upon the situs of the courthouse. The appellate court below also has decided that an accused is not entitled to the assistance of counsel with the onset of the adversary criminal process but before the commencement of any formal judicial proceeding: an important issue which has not been but should be settled by this Court. Furthermore, in conflict with principles established by this Court, the appellate court below wrongfully denied petitioner an evidentiary hearing and concluded that evidence essential to the state's case was properly received into evidence.

For the foregoing reasons, petitioner prays this Court to issue the writ of certiorari.

Respectfully submitted,

BERNARD A. BERKMAN
HAROLD L. LEVEY
Counsel for Petitioner

APPENDIX A

Journal Entry of the Cuyahoga County Juvenile Court

(Dated December 7, 1971)

No. 273060

THE JUVENILE COURT OF CUYAHOGA COUNTY
State of Ohio, County of Cuyahoga

IN THE MATTER OF JAMES SALER, Delinquent Child

This cause came on for hearing this seventh day of December, 1971, before the Honorable John J. Toner upon the complaint of Margaret Hill alleging that James Saler a child about the age of fifteen years is a delinquent child in this: That on or about July 16th 1971 about 5:00 P.M. he did unlawfully with another now unknown in the general vicinity of the rear of Jim's Steak House, at the East end of the Detroit Superior Bridge, Cleveland, Ohio, did forcibly with a knife and against her will commit rape upon the person of one Margaret Hill, a female person, age 19 years, in violation of Section 2905.01, of the O.R.C. (2) That on or about July 16th 1971 about 5:00 P.M. with another now unknown, in the general vicinity of the East end of the Detroit Superior Bridge in the rear of Jim's Steak House, Cleveland, Ohio, with a knife force carnal copulation against nature with a certain female person age 19 years, to wit: one Margaret Hill, in an opening of the body of the said Margaret Hill other than sexual parts, in violation of Section 2905.44 of the O.R.C. (3) That on or about July 16th, 1971 about 5:00 P.M. with another now unknown, in the general vicinity of the East end of

the Detroit Superior Bridge, in the rear of Jim's Steak House, Cleveland, Ohio, by force and violence and by putting in fear with a knife, take, steal and carry away from the person of one, Margaret Hill, an adult female person, age 19 years, cash in the amount of $90.00 or $100.00, the personal property of the said Margaret Hill, in violation of Section 2901.241 of the O.R.C. On November 5, 1971 notice in writing having been given to the child's mother at least three days prior to hearing on November 5, 1971 and after such hearing the Court finds that there was probable cause to believe that the child committed the act alleged, which act constitutes a felony if committed by an adult. The Court further finds that the child was fifteen years of age at the time of the conduct charged. The Court further finds after full investigation, including a mental and physical examination of such child made by the psychiatric clinic of the Court that there are reasonable grounds to believe that the child is not commitable to an institution for the mentally retarded or mentally ill; that he is not amendable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children; and that the safety of the community requires that he be placed under legal restraint including, if necessary, for the period extending beyond his majority. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that under the provisions of Section 2151.26 Ohio Revised Code, said child, James Saler, is bound over for further proceedings according to law. It is further ordered that said child be remanded to County Jail pending furnishing a One Thousand Dollars cash or surety or Two Thousand Dollars real estate appearance bond. Whereupon James Saler furnished bond in the amount of One Thousand Dollars surety with Allegheny Mutual Insurance Company, by Chuck Harden, 1601 East 21st Street, Cleveland, Ohio, Attorney-in-Fact, sureties

conditioned for child's appearance before the Common Pleas Court of Cuyahoga County, which said bond is approved by the Court.

/s/ JOHN J. TONER
Judge

APPENDIX B

Opinion of the Court of Common Pleas

(From Transcript of Proceedings, April 13, 1972)

No. CR-2552

IN THE COURT OF COMMON PLEAS
State of Ohio, Cuyahoga County

STATE OF OHIO,
Plaintiff,

vs.

JAMES SALER,
Defendant.

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[729] The Court: The Court has heard the evidence in this particular case, and in a unique situation such as this sits in a dual capacity both as the trier of the facts and as the trier of the law.

Although no formal motion was made and without attempting to weigh the evidence, one of the questions of law this Court was required to rule on in determining this case was the suggested identification of the Defendant.

The question was: Was it so tainted so as to preclude any in-court identification?

In this case the Court is not overly fond of the confrontation method used by the police in their desire to either implicate or let go, and it therefore becomes my duty to determine and look behind the confrontation to the circumstances that the witness had in identifying the individuals who perpetrated this alleged assault upon her.

In weighing the testimony, the Court finds that the witness testified and the Court so finds that the alleged assault took **[730]** approximately a half hour, that it happened around 5:15 or 5:30 in the evening, that it was daylight, in July.

The Court will take judicial notice of the fact that it is bright at that time.

That the person or persons who perpetrated this assault or alleged assault were less than—she testified at least a foot from her for a period of time, about a half hour.

The Court finds that the witness had an ample opportunity to observe the people who perpetrated this particular act on her and finds beyond a reasonable question that Miss Hill had a great opportunity to identify the perpetrator of the crime, and that, therefore, the in-court identification is not tainted by the confrontation, that the identification was independent of the confrontation caused by the police department.

In weighing now the facts of this particular case and sitting as a jury in this particular case, the Court, of course, realizes, as a jury would that the burden of proof is on the State of Ohio to prove its case beyond a reasonable doubt, and that the Court is **[731]** required to weigh that reasonable doubt in favor of the Defendant.

The Court must, as the trier of the facts, weigh the testimony of the witnesses who have testified here in this case.

The Court realizes that the burden of proof is on the State of Ohio to establish each and every one of the elements of the crime of rape, sodomy and armed robbery.

The Court feels, and will so find, that the elements at least of rape have been satisfied, the elements of sodomy have been satisfied, and the elements of armed robbery have been satisfied.

I think it is well established that no corroboration is necessary in establishing a rape. The testimony of Margaret Hill was sufficient in and of itself to establish the elements of rape.

Dr. Eisenstadt, however, did corroborate to a certain extent the testimony of Margaret Hill that someone had perpetrated some sort of an assault upon her. Certainly one does not normally find leaves on the buttocks, an abrasion of the temple, and as his testimony **[732]** was that there was some prior sexual activity. He could tell by the examination that he conducted.

The Court is mindful of 1.17 of our section of our Code which is referred to as the aider and abettor section of the Code, that anyone who aids, abets or assists another in the procurement of a crime is equally as guilty as the principal offender.

The Court finds in this particular case, based upon the testimony of Margaret Hill, that two boys, one actually committed the crime of sodomy upon her, the other assisted that individual although did not actually perform that particular act upon her, but assisted, aided and abetted in that particular crime.

The same certainly is true of the crime of armed robbery, that the two who did this were acting together in a concerted action.

Certainly there is no question of the rape. Both, she testified that both the individuals perpetrated the crime of rape upon her.

The question then becomes in the Court's mind anyway, since the elements have been **[733]** established, who performed the particular act upon Margaret Hill or particularly did James Saler? Has the State proved that James Saler performed these acts upon her either by the law of aider and abettor or personally and individually?

And the Court in considering this realizes that the Defendant in this particular case presented alibi witnesses in his behalf, and that alibi is not a defense and no burden of proof is placed upon the Defendant to establish an alibi, but rather the burden is on the State of Ohio to prove its case by evidence beyond a reasonable doubt.

The Court would also like to point out that certain witnesses testified here this morning, Mr. John Douglas and Miss Rosezita Chromek, and these witnesses were permitted only to rebut the evidence given by the Defendant himself and were limited solely, in this Court's mind anyway, to the evidence given by the Defendant that he had only been down to this section of the flats on the day of arrest, that of July 30, 1971, and as he testified some five months before.

[734] In weighing all the testimony, that of Margaret Hill, defense witnesses, and the limited purpose of the rebuttal evidence, the Court can come to but one conclusion, and the Court finds that the State has established its case by proof beyond a reasonable doubt and will find the Defendant guilty of the crimes charged.

The Court, before passing sentence on this matter, must remand James Saler and order an investigation per Revised Code Section 2947.25, and when that investigation is completed, the Court will pass judgment at that time.

APPENDIX C

Opinion and Journal Entry of the Court of Appeals

(Dated April 19, 1973)

No. 31942

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY
OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellee

VS

JAMES SALER, a minor
Defendant-Appellant

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The defendant-appellant was convicted of rape (R.C. 2905.01), sodomy (R.C. 2905.44), and armed robbery (R.C. 2901.241) at a trial before a judge in Common Pleas Court, a jury trial having been waived.

On appeal the appellant assigns five errors:

1. The Court of Common Pleas erred in its verdict in view of the Defendant being subjected to an out-of-court identification without the benefit of counsel being present, in violation of due process.
2. The Court of Common Pleas erred in its verdict in view of the Defendant being subjected to an out-of-court identification on a single basis and not as part of a lineup, in violation of due process.
3. The Court of Common Pleas erred in its verdict in that the State did not establish its case beyond a reasonable doubt.
4. The Court of Common Pleas erred in the method used to examine a witness, constituting an abuse of discretion.
5. For other errors apparent on the face of the record.

We find none of the assignments of error to be with merit.

Assignments 1-2

During the trial, the following facts regarding the out-of-court identification of the defendant were testified to:

Shortly after she had been raped and robbed the prosecutrix told the police her assailants were two white boys around age 15, one with dark hair and the other with lighter hair, without other distinguishing characteristics.

Two weeks after the rape the prosecutrix was called to the police station and taken into a room by a policewoman where there were two young white boys, one with light hair and the other with dark hair. Upon being asked if she recognized anyone, she responded immediately by identifying decisively the defendant as one of her assailants but she did not recognize the other boy.

The defendant's mother was then called to the police station and in another room in the presence of the defendant, the defendant's mother and a policewoman, the prosecutrix again identified the defendant as one of her assailants.

All of the above events took place before the defendant's indictment and without counsel present.

The defendant contends that the out-of-court identification procedure in this case violated due process of law because the identification was on a single basis and his lawyer was not present, and therefore all testimony concerning the confrontations should have been excluded at the trial.

The defendant's contention is not well taken.

The Ohio Courts and the United States Supreme Court have never required the presence of counsel at a pre-indictment identification procedure. The exclusionary rule of *United States v. Wade* (1967), 388 U.S. 218, and *Gilbert v. California* (1967), 388 U.S. 263, applies only to post-indictment pretrial lineups in absence of counsel.[1]

Nor has a one-on-one confrontation been held to be a violation of due process *per se*. Though the practice

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1. This has been made clear by the recent decision of *Kirby v. Illinois* (June 7, 1972), 40 USLW 4607, which, though decided after the present case, relies on earlier case law to hold that the right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant.

of showing suspects singly for purposes of identification has been widely condemned, a violation of law in the conduct of a confrontation depends upon the totality of the surrounding circumstances and whether the confrontation procedure was unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno* (1967), 388 U.S. 293.

The confrontation procedure in the present case was not unnecessarily suggestive or conducive to irreparable mistaken identification. At the police station the prosecutrix was told to go into an office and see if there was anyone she recognized. Without any suggestive conduct on the part of the police officers which would undermine the reliability of the eyewitness identification, she immediately singled out the defendant who was sitting in the office next to another boy whom she did not recognize.

Further, though the out-of-court identification was referred to by the prosecutor in his opening remarks to the court, no objection was then made by the defendant and it was the defendant who first introduced testimony at the trial concerning the identification.

For the above reasons, we find the first and second assignments of error to be without merit.

Assignment 3

Testimony was elicited at the trial to support the finding of guilty beyond a reasonable doubt on each of the charges either as a principal or a principal by aiding and abetting.

The prosecutrix testified that both boys raped her while a knife was held to her throat, that sodomy was committed upon her and her money was taken.

The defendant attempted to establish an alibi through witnesses all of whom were either related to him or close friends of the family. The trier of facts may accept all, part, or none of what a witness testifies to. We are not permitted to invade the province of the trier of facts.

Assignment 4

At the conclusion of the prosecutrix's testimony, the following colloquy took place between the court and the prosecutrix:

The Court: I just have one question or a few questions of you.

Your identification in this courtroom, is it based upon your observations at the police station, or is it based upon your observations as to what occurred on July 16, 1971?

The Witness: What occurred on July 16th.

The Court: How long were you with these individuals on July 16, 1971?

The Witness: About a half an hour.

The Court: What were the lighting conditions at that time?

The Witness: It was very light out.

The Court: What time of the day or night was it?

The Witness: About quarter after 5:00 until quarter to 6:00.

The Court: You say very light. Do you mean that the sun was still out?

The Witness: Yes.

The Court: And how close were you to these individuals?

The Witness: About a foot away.

The Court: For the entire half hour?

The Witness: Yes.

The questions put to the witness by the court and the answers elicited were admissible under the law.

No other errors apparent on the face of the record, the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JOHN M. MANOS
Presiding Judge

MANOS, C.J., JACKSON, J., CORRIGAN, J., Concur.

APPENDIX D

Entry Denying Motion for Reconsideration by the Court of Appeals

(Dated May 14, 1973)

No. 31942

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY

STATE OF OHIO
Appellee

vs.

JAMES SALER, A Minor
Appellant

JOURNAL ENTRY

Motion by defendant appellant for reconsideration overruled. Exc.

/s/ JOHN M. MANOS
Presiding Judge

MANOS, C.J., JACKSON, J., CORRIGAN, J., Concur.

APPENDIX E

Orders of Supreme Court of Ohio Denying Leave to Appeal

(September 20, 1973)

No. 73-579

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
JAMES SALER, a Minor,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

* * * * *

(Caption as above)

It is ordered by the Court that this motion is overruled.

APPENDIX F

Entry of Supreme Court of Ohio Denying Motion for Reconsideration

(Dated October 18, 1973)

No. 73-579

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

THE STATE OF OHIO,
Appellee,

vs.

JAMES SALER,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX G

Order of the United States Supreme Court Denying Stay Pending Petition for Certiorari

(November 13, 1973)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

November 13, 1973

Bernard A. Berkman, Esquire
Berkman, Gordon & Kancelbaum
2121 The Illuminating Building
Cleveland, Ohio 44113

Re: *James Saler, a minor v. Ohio, A-474*

Dear Mr. Berkman:

Your application for stay in the above-entitled case was presented to Mr. Justice Stewart, who has endorsed thereon the following:

"Application denied.

November 13, 1973

Potter Stewart"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ ARTHUR G. CHRISTEAN
Deputy Clerk

lab
cc: John T. Corrigan, Prosecuting Attorney
Atten: Robert R. Feighan, Asst. Pros. Att.
of Cuyahoga County, Ohio
1560 East 21st Street
Cleveland, Ohio

APPENDIX H

Memorandum Opinion and Order of District Court

(Filed June 20, 1974)

No. C 73-1230

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES SALER, a minor,
Petitioner,

v.

RALPH KRIEGER, et al.,
Respondents.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C.J.*

This is a petition for a writ of habeas corpus. The petitioner, James Saler, is only eighteen years old. He submits that he was convicted of crimes in violation of basic constitutional rights. He advances, in his petition, three closely interrelated contentions relating to in-court and pre-trial identifications of him, made by a rape victim. They are:

(1) "The totality of circumstances surrounding the out-of-court confrontation was suggestive of a substantial likelihood of irreparable misidentification."

(2) "The out-of-court, one-on-one confrontation, conducted without any necessity for avoiding the cus-

tomary line-up procedure with the presence of counsel, is an unnecessarily suggestive process and a *per se* violation of due process."

(3) "The out-of-court confrontation violated petitioner's Sixth Amendment rights in that it was conducted in the absence of counsel."

I.

Petitioner was indicted for the crimes of armed robbery, rape, and sodomy, in violation of Sections 2901.13, 2905.01, and 2905.44 respectively of the Ohio Revised Code. After a bench trial, beginning on April 7, 1972, he was found guilty of each of the charges in the indictment, and sentenced to the Ohio State Reformatory for an indeterminate period according to law on each count, the sentences to run concurrently.

The Court of Appeals for Cuyahoga County affirmed the conviction and sentence, and the Supreme Court of Ohio dismissed petitioner's appeal on the ground that it raised no substantial constitutional question. On November 13, 1973, Mr. Justice Stewart denied petitioner's application for an indefinite stay of execution of sentence pending the timely filing and determination of a petition for writ of certiorari. Thereafter, no such petition was filed.

On December 4, 1973, this Court, upon agreement of the respondent, granted petitioner's application for bail pending determination of his habeas corpus petition.

At trial, the victim testified to the circumstances of the crimes, and positively identified petitioner as one of her assailants. This was done as part of the State's direct case. No objection was made to this identification, nor were there any pre-trial motions to suppress the identification. Instead, petitioner's counsel elicited on cross-exam-

ination the circumstances surrounding certain pre-trial identifications of petitioner made by the victim.

Two police officers subsequently came to the witness stand. Both testified extensively as to the pre-trial confrontations. The petitioner and his mother also presented their respective views of these events as part of the defense's case.

Although never formally asked,[1] the state trial judge, who was sitting in the dual capacity of finder of fact and arbiter of the law, felt compelled, on his own motion, and before reaching a verdict, to pass on the constitutionality of the victim's in-court identification. He noted that he "was not overly fond of the confrontation method used by the police in their desire to either implicate or let go," and that, accordingly, it was his "duty to determine and look behind the confrontation to the circumstances that the witness had in identifying the individuals who perpetrated the alleged assault upon her" (Tr. 729). In "weighing the testimony", however, and after citing a number of factors supporting his view, he concluded: "the in-court identification . . . [was] not tainted by the confrontation, . . . the identification was independent of the confrontation caused by the police department." (Tr. 730).

In affirming petitioner's convictions, the Ohio Court of Appeals dealt, in essence, with the three contentions here raised. The Court quickly concluded that the out-of-court identification procedures were not conducted in violation of petitioner's constitutional right to counsel. Reliance was placed on *Kirby v. Illinois*, 406 U.S. 682 (1972). In that case, the Supreme Court limited the proscription, both of uncounseled identifications, and testimony thereof,

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1. The propriety of the pre-trial identification encounters was argued during the course of closing arguments.

as recognized in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) to pre-trial identifications made at or after the time that adversary judicial proceedings have been initiated.

The record here fully confirms the Court of Appeal's holding on this issue. There is no dispute that petitioner was without counsel at the time of the pre-trial identifications. It is clear, however, that these identifications took place almost immediately after petitioner's arrest, and before any formal charges were made against him. Accordingly, there is no merit to petitioner's third contention. *See also Hastings v. Cardwell*, 480 F.2d 1202 (6th Cir. 1973).

The Court of Appeals also concluded, citing *Stovall v. Denno*, 388 U.S. 293 (1967), that the confrontations were not either unnecessarily suggestive or conducive to irreparable mistaken identification. The Court recognized that petitioner was subjected to what was in essence, a one-on-one confrontation with the victim. At the same time, it was concluded in view of "the totality of the surrounding circumstances" that the confrontation was not such as to undermine the essential reliability of the eyewitness identifications, or require exclusion of such testimony at trial.

II.

As indicated previously, the victim did not, as part of her direct examination, allude to her pre-trial identifications of petitioner. The prosecutor, however, referred to them in his opening statement (Tr. 25), and the direct testimony of one of the police officers included corroboration of these identifications. No objections were ever entered, however, either to the prosecutor's remarks, or the police officer's testimony. Petitioner's counsel, to the con-

trary, actively developed the record on these matters, and, in fact, first raised the pre-trial identifications as part of his cross-examination of the victim. Significantly, and as also noted earlier, the state trial court, who would have had to hear the evidence anyway if a proper motion had been made, viewed the pre-trial confrontations as constitutionally suspect. Considering all these circumstances, no error of any constitutional dimensions possibly arises, merely from the admission, as part of the State's case, of some evidence of the pre-trial identifications. *Compare e.g. United States ex rel. Burke v. State of Illinois,* 465 F.2d 268 (7th Cir. 1972); *Ward v. Wainwright,* 450 F.2d 409, 413 (5th Cir. 1971); *Clemons v. United States,* 408 F.2d 1230, 1246 (D.C. Cir. 1968) (en banc), *cert. denied* 394 U.S. 964 (1969). Petitioner, particularly in his traverse, does not really argue otherwise.[2] Accordingly, the Court will focus on whether any constitutional error was committed in permitting the victim's in-court identification of petitioner.

The State's case did not rest solely on the victim's in-court identification. Circumstantial evidence was adduced linking petitioner to the crimes. William Patton, petitioner's companion at the time of his arrest, testified, in addition, that petitioner had told him, approximately one week after the crimes were committed, that he had had "sex with some girl in the flats and had taken some money from her." (Tr. 191-192). There is no doubt, however, that the crucial evidence offered by the State connecting petitioner with the assault, rape, and robbery was the victim's identification testimony. Accordingly, if that

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2. In his "Traverse and Memorandum," filed May 24, 1974, petitioner basically argues that the admission of the victim's in-court identification evidence requires the issuance of a writ. The argument is not made that any consideration which the state trial court gave to the evidence of the pre-trial identifications would, of itself, be constitutional error.

testimony was tainted by unlawful identification procedures, the error in not suppressing it could not be viewed as harmless.

The material basic facts, as adduced at the state court trial, may be summarized as follows. On July 16, 1971 the victim, aged nineteen and a high school graduate was employed as a receptionist for a company located in the Leader Building at Sixth and Superior Street, in downtown Cleveland. According to her testimony at trial she left work on that day at approximately 4:45 p.m., and did some quick shopping. The weather was clear, bright, and warm.

She arrived at the east end of the Detroit-Superior Bridge at about 5:15 p.m. She proceeded down a concrete path that winds to an area commonly known as the "flats." While walking down the path, she noticed a boy behind her, but continued on her way. A few seconds later, an arm was around her neck, and a knife was at her throat. Another boy was standing nearby with a broken bottle in his hand. The victim said: "If it's money you want you can have it." (Tr. 60) The response from one of the two boys was: "That's not what we want." (Tr. 60).

The victim was forced off the path and made to lie down on some abandoned concrete steps amidst bushes. Both boys proceeded to rape her, and one of the boys made her commit oral sodomy. The victim identified petitioner as the boy who committed only the rape.

Thereafter, according to the victim's testimony, the boys got up, took approximately eighty dollars from the victim's purse, and told her to stay at the spot for ten minutes or "we will kill you." (Tr. 61) The boys then fled. The assault took approximately fifteen minutes to

one-half hour, and occurred around 5:15 p.m. or 5:30 p.m. in broad daylight. The juvenile assailants wore no masks, and did not, in any other way, try to conceal their identity.

The victim did not wait ten minutes, but got dressed and started back up the path. She came across a man proceeding down the path, and asked for help. This man unidentified at trial, took her down to a restaurant in the "flats" called "Diamond Jim's," where the police were notified.

The record is not clear as to the exact sequence of events thereafter on that evening. The testimony of the various witnesses was somewhat inconsistent. The record does disclose that two policemen arrived at "Diamond Jims" shortly after being called. They questioned the victim, and transported her to Charity Hospital, where she was examined, given sedation, and then released. It also appears that a limited search of the area was conducted in an attempt to find the two young assailants, and one viewing of the path where the assault took place was made by the police in the company of the victim, and another in her absence.

The police elicited a description of the two assailants from the victim. The exact degree of detail given is not clear from the record.[3] It would appear, however, that, at the very least, she described them as being white males, between twelve and fifteen years old, one dark-haired, and the other light haired, both wearing play clothes. (Tr. 214-215)

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3. This is so primarily because the police officers who testified at trial inexplicably neglected to bring with them existing notes relating to their interviews with the victim. Consequently they testified entirely from memory.

It is clear that in the course of their investigation that evening, the police stopped at a gas station located near the summit of the path, apparently in the company of the victim. The gas station attendants were told of the incident, given a description of the two juvenile assailants, and asked to keep on the lookout for them.

On July 30, 1971, at approximately 5:40 p.m., Miss Rosezita Chromak came running up the same path, out of breath and apprehensive. Miss Chromak, a secretary working for the Republic Steel Corporation, used the path regularly to get to and from work. She was aware of the incident of July 16, and had been warned to watch out for two boys, one dark haired, and the other light haired.

As she testified,[4] she first perceived two boys on the path matching the description previously given her on July 29 at approximately 5:40 p.m. Thinking that these boys might be the two assailants, she backtracked up the path to await others. Four or five people arrived, and she again proceeded down the path, slightly ahead of them. The two boys were still where she testified she had first seen them—i.e. at a "blind curve" on the path (Tr. 650)—but this time she passed them. One of the boys, she testified, asked her for a dime, and she responded: "No comprendre" so that they would think she could not speak English. (Tr. 669)[5]

When she reached the end of the path, Miss Chromak turned in a direction opposite from that of the people

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4. Miss Chromak was called by the State for the purpose of rebutting the petitioner's testimony that he had been on the path only once before June 30, and this was many months before that date.

5. In his testimony, petitioner admitted he did ask a woman for a dime while on the path. He asserted, however, that this took place on June 30. (Tr. 427-428)

behind her. She noticed the boys following her, and solicited the aid of a man to chase them away.

Upon reaching the top of the path on July 30, Miss Chromak approached two people from her company who were standing by the gas station near the entrance to the path. She asked them if she could walk down the path with them as she was "deathly afraid to go down by myself because of two boys down there." (Tr. 654) She had again seen the same two boys on the path.[6]

Miss Chromak's remarks were either partially directed at or overheard by Mr. Andrew Farren, one of the gas station attendants who had previously been asked by the police to keep his eye out for the boys. Subsequently, Mr. Farren's brother, the other attendant, went down the path and returned with petitioner and a companion, William Patton, in his custody.[7] The boys were placed in the gas station, and the police were called. A knife described to be of "fairly decent" size (Tr. 180) was taken from Patton by Mr. Farren.[8]

The police officers who responded to Mr. Farren's call were the same two who had initially investigated the incident of July 16. They conferred briefly with Mr. Farren, arrested the boys, and conveyed them to Central Police Headquarters.

The two boys were placed in room 108 of the police station. The room was described at trial as "the Lieuten-

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6. Miss Chromak was not able positively to identify petitioner at trial as one of the two boys she saw on the path. (Tr. 652)

7. Petitioner testified that he and his companion were physically coerced to accompany the gas station attendant to the gas station. (Tr. 326)

8. Mr. Farren, however, was unable positively to identify petitioner at trial as one of the boys that he and his brother had apprehended. (Tr. 168)

ant's Office" (Tr. 237). It was large, with an open archway as an entrance. (Tr. 253) It was used as headquarters for the Third District police, as an information center, and for juvenile bookings. It was filled with desks, chairs, and a counter; and had a sitting area.

The two police officers then conferred with two policewomen who had participated in the investigations undertaken on July 16, and who had been summoned to assist that evening.

The police proceeded to notify the victim and the parents of the two boys by telephone. Although it is not entirely clear from the record, it appears that one of the policewomen, Officer Bilinovich, called the victim. As the victim testified, she was told that the police had picked up "two suspects," and was asked to come down to the station (Tr. 137). This was the first contact she had had with the police since July 16.

The victim arrived at Central Police Headquarters at approximately 8:00 p.m. (Tr. 139, 289), and before the parents. She met the policemen who aided her on July 16, and the policewomen. She was told to walk into room 108 and see if she could recognize anyone (Tr. 140-143). It is not clear whether she was told anything else by the police. Both officers Bilinovich and Roche testified that nothing else was said. (*See e.g.* Tr. 208, 258-59) Yet the victim herself testified that she had been informed prior to viewing the boys, probably by policewoman Bilinovich, of the circumstances of the boy's arrest (Tr. 158-59)

The victim entered the room in the company of the police officers. She positively identified petitioner as her dark haired assailant (See Tr. 143, 240, 258), but was unable to identify with certainty William Patton (Tr. 144).

The record is not clear as to the exact number of people who were in the room at that time, but it does disclose that there were no other civilians present, and certainly no other boys resembling either of the two boys. (Tr. 239, 258, 389-90). Petitioner's mother was not present. The boys were not handcuffed or manacled in any way (Tr. 238), and the confrontation appears to have lasted no longer than ten minutes. (Tr. 338)

Thereafter, the scene shifted to the Detective's Bureau on the third floor of the police station. Petitioner was placed at one end of a long table beside his mother who had finally arrived. The victim was seated at the other end of the table, next to Officer Bilinovich, facing petitioner and his mother. Others in the room included several police officers. William Patton and his parents may also have been present (Tr. 243), but it appears that they were not (Tr. 147-260, 340, 476).

At this confrontation, petitioner was given Miranda warnings in the presence of his mother and the victim. (Tr. 242, 260).[9] At the prompting of the police, the victim related to petitioner and his mother the nature of the crimes, and accused petitioner to his face of being one of the assailants. (Tr. 147). Petitioner denied any involvement (Tr. 240), but the victim never waivered in her certainty (Tr. 294). This second confrontation lasted approximately one hour. (Tr. 262). At its conclusion, according to the testimony of officer Bilinovich, the victim was "emphatic" about her identification. (Tr. 262) Petitioner was detained as a consequence.

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9. This was not the first time such warnings were given petitioner but it was the first time it was done in the presence of his mother.

III.

The test to be applied in passing on whether the admission of the victim's in-court identification amounted to a denial of due process may best be seen as two-pronged. As was said by Judge Friendly in *United States ex rel. Phipps v. Follette*, 428 F.2d 912 (2nd Cir.), *cert denied* 400 U.S. 908 (1970) at 914-15:

> "The first question is whether the initial identification procedure was 'unnecessarily' . . . or 'impermissibly' . . . suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification . . . or had such a tendency' to give use to a very substantial likelihood of misidentification . . . that allowing the witness to make an in-court identification would be a denial of due process." *See also United States ex rel. Bisordi v. LaVallee*, 461 F.2d 1020 (2nd Cir. 1972).

Respondent argues that the pre-trial identification procedures here involved may not be viewed as "show-ups." It is emphasized that the victim was shown two boys and not just one, particularly during the first encounter. This argument is specious. The victim was presented at the police station with two "suspects," each matching the description of only one of her assailants. Her viewing of the boys may not be categorized as being similar to that of a "lineup" procedure, where she would have been required to select from a group of persons of substantially similar appearance. The victim obviously viewed each of the boys separately and distinctly. Accordingly, what took place here was in the nature of a "show-up," wherein a "witness is presented with an individual and asked if he can make

an identification," *United States ex rel. Raymond v. Illinois*, 455 F.2d 62, 63 n.1 (7th Cir.), *cert. denied* 409 U.S. 885 (1972).

One man "show-ups" have been harshly criticized by the courts. *See e.g. Stovall v. Denno, supra,* at 302. At the same time, there is no *per se* rule declaring them violative of due process or requiring exclusion of testimony relating to them. *See Neils v. Biggers,* 409 U.S. 188, 198 (1972) ("But as *Stovall* makes clear, the admission of evidence of a show-up without more does not violate due process."); *See also Stidham v. Wingo,* 482 F.2d 817 (6th Cir. 1973); *Hastings v. Cardwell, supra; Stanley v. Cox,* 486 F.2d 48 (4th Cir. 1973); *Roper v. Beto,* 454 F.2d 499 (5th Cir.) *cert denied* 406 U.S. 948 (1972) (O'Sullivan J.). As was said in *United States v. Davis,* 407 F.2d 846, 847 (4th Cir. 1969):

> [D]ue process does not require that every pre-trial identification of a witness must be conducted under laboratory conditions of an approved lineup."

"Show-ups" however, are inherently suggestive, and in this case there are present certain aggravating factors. Petitioner, it is true, was not in handcuffs at the time he was viewed by the victim. But he was clearly in custody, sitting in one of the offices used for bookings in the police station. At the initial "show-up", the victim was surrounded by police officers who she knew to be familiar with the crimes she endured, and who had invited her to view "suspects." The victim, moreover, according to her own testimony at trial, had been informed by the police of the suspicious circumstances of the boys' arrest. Significant, too, is the fact that the telephone call summoning her to the station on the evening of July 30, was the first contact she had had with the police since the date of the assault, two weeks earlier.

The second confrontation was clearly conducive to a hardening of the victim's identification. This time, the victim's attention was on petitioner alone for nearly one hour, and she heard him deny her word. Emotions must have been running high. Indeed, according to the testimony of petitioner's mother, at one point both petitioner and the victim offered to take lie detector tests. (Tr. 474). Any vengeful motives or outrage that the victim may have felt were given full rein for development. *United States v. Wade, supra* at 230.

The Court perceives little if any justification for these procedures. These were not confrontations occurring promptly after the crimes. *See e.g. Stidham v. Wingo, supra; Hastings v. Cardwell, supra; Mock v. Ross,* 472 F.2d 619 (6th Cir.), *cert denied* 411 U.S. 971 (1972); *Bates v. United States,* 405 F.2d 1104 (D.C. Cir. 1968) (Burger J.) Nor was there any urgency or emergency necessitating them. *See e.g. Stovall v. Denno, supra.* Rather they were deliberate encounters, neatly orchestrated by the police. *Contrast Mock v. Rose, supra.*

At trial, when policewoman Bilinovich was asked why no lineup was arranged, she testified that she was "aware of the policy of the Juvenile Court that they do not hold lineups for children when you bring them in off the street" (Tr. 290). This explanation may only be taken as extraordinarily lame, when one considers the serious nature of the crimes involved, and the importance of a proper and reliable identification. Significantly, Officer Bilinovich testified that when three other children were picked up as possible suspects prior to June 30, she at least took the precaution of checking their alibis, before proceeding further. Finding these alibis to be firmly established, these three children were released without more.

Notwithstanding the "unnecessary suggestiveness" of the pre-trial identification procedures, a claimed violation of due process must be assessed in light of the totality of the circumstances. In *Neils v. Biggers, supra* at 198 the Supreme Court reaffirmed: "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States,* 390 U.S. at 384." The record here is replete with indicia that the victim was not overborne by the suggestiveness of the procedures used, and that her in-court identification had a definite independent basis.

First, it is clear that the victim spent approximately fifteen minutes to one-half hour with her unmasked assailants at extremely close range, and under well lighted conditions. The victim, in consequence, had ample opportunity to fix petitioner's image in her mind. Second, the victim was "no casual observer, but rather the victim of one of the most personally humiliating of all crimes" *Neils v. Biggers, supra* at 200. Third, the victim did give the police a description of petitioner which, although seemingly somewhat general, was entirely consistent with petitioner's appearance. Fourth, and perhaps most significant, the victim immediately and firmly identified petitioner at the police station, but was unable to do the same with regard to his companion. This circumstance goes far to indicate that the victim was careful, and not influenced by the suggestiveness of the "show-ups."

The "show-ups" here took place two weeks after the crime, and there is no denying that "the longer the interval between the crime and the confrontation the greater the likelihood that the second image will play an important role in the in-court identification." *United States ex rel. Bisordi v. LaVallee, supra* at 1024. The factors listed above, however, firmly militate against this having oc-

curred. Other cases, moreover, have not found in-court identifications proceeded by "show-up" viewings taking place after equivalent relatively short intervals to be violative of due process where the record provides strong, countervailing indicia that the identifications were essentially reliable, and not the product of police suggestion. *e.g. Johnson v. Salisbury,* 448 F.2d 374 (6th Cir.), *cert denied* 405 U.S. 928 (1971); *Hancock v. Tollett,* 447 F.2d 1323 (6th Cir. 1971); *United States ex rel. Bisordi v. LaVallee, supra*; *United States ex rel. Rutherford v. Deegon,* 406 F.2d 217 (2nd Cir.), *cert denied* 395 U.S. 983 (1969). *See also Neils v. Biggers, supra.*

Petitioner contends that the victim, immediately subsequent to the incident "was so emotionally upset that she was uncertain as to what exactly was happening to her, and who was saying or doing what." There is no basis for this in the record. There is testimony that the victim was very upset, and was crying (Tr. 126, 210, 212), and that she received sedation upon being taken to the hospital. Officer Billinovich testified, however, that the victim was "coherent" when she interviewed her at the hospital (Tr. 267), and it is clear that the victim had enough control to give the police an account of what had happened, and a description of her assailants.

Under cross-examination, the victim never faltered in her unequivocal and positive identification of petitioner.[10] Petitioner emphasizes that when the victim was asked to examine him closely to determine whether he was about the same height and weight as he was when she first identified him, she testified, "Yes, about." (Tr. 149). This,

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10. The victim testified at preliminary proceedings held in Juvenile Court on November 5, 1971. The record of those proceedings indicates that she identified petitioner at that time with complete certainty as one of her assailants.

petitioner asserts, demonstrates the unreliability of her identification, as objective evidence introduced at trial indicated that at that time petitioner was substantially taller and weighed far more.

This apparent discrepancy, as well as other alleged infirmities in the victim's testimony, are matters essentially going to the weight to be given such evidence. Their relevance to the inquiry being made here is marginal. As was said in *United States v. Casscles*, 358 F. Supp. 517 (E.D. N.Y. 1973) *reversed on other grounds* 489 F.2d 20 (2nd Cir. 1973):

> "The court is not concerned with the reliability of properly admitted identification testimony, but only whether the procedures leading to the identification were so defective as to make the identification constitutionally inadmissible. . . ."

A factor to be emphasized is that the victim was subjected to extensive cross-examination at trial. All facts concerning possible misidentification were before the state trial court, and were forcefully argued in closing arguments (Tr. 683-689). See *United States ex rel. Rutherford v. Deegon, supra.* The state trial court, however, who saw and heard all the witnesses, gave credence to the victim's identification, notwithstanding any alleged infirmities, and rejected petitioner's alibi defense, which was developed through his own testimony and that of several relatives, and one close friend of his family.

This is not a case like *Foster v. California*, 394 U.S. 440 (1969) where the pre-trial confrontation procedures utilized by the police were such as to lead almost inexorably to a defective identification. Rather it is much more analogous to cases where, at the very least, in-court identifications were found to be constitutionally permissible.

See e.g. Neils v. Biggers, supra; Hancock v. Tollett, supra; United States ex rel Carnegie v. MacDougall, 422 F.2d 353 (2nd Cir.), *cert denied* 398 U.S. 912 (1970).

The Court concludes that even though the pre-trial confrontations were "unnecessarily suggestive," they did not give rise to such a danger of "irreparable mistaken identification" as to require the exclusion of the victim's eye-witness testimony. Accordingly, the victim's in-court identification was properly admitted in evidence. The petition for writ of habeas corpus is denied.

The petitioner is ordered to surrender himself to the appropriate authorities within ten days of entry of this order. If he does not voluntarily surrender within ten days, it is ordered that he be taken into custody by the proper authorities, unless otherwise ordered by a court of competent jurisdiction.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

APPENDIX I

Order of the Court of Appeals for the Sixth Circuit

(Filed April 23, 1975)

No. 74-2130

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SALER,
Petitioner-Appellant,

v.

RALPH KREIGER, *et al.*,
Respondents-Appellees.

ORDER

Before: CELEBREZZE, MILLER and ENGEL, *Circuit Judges.*

The petitioner, James Saler, appeals the denial by the district court of his petition for habeas corpus, challenging his conviction in an Ohio state court on various criminal charges of a serious nature, including rape. The sole ground on which the petitioner challenges the validity of his conviction in the state court is that the state used illegal pretrial showup procedures for the purpose of having the victim of the alleged crimes identify the petitioner as one of her assailants. The district court, relying upon the facts developed at the state court trial, found that although the procedures were unnecessarily suggestive, the suggestion under the totality of the circumstances was

not so conducive to irreparable misidentification as to constitute a denial of due process of law.

We have examined the record and we find that this conclusion of the district judge is fully supported by the state court record and is in accord with the ruling of the Supreme Court of the United States in *Neil v. Biggers*, 409 U.S. 188 (1972).

It is therefore ORDERED and ADJUDGED that the judgment of the district court be and the same is hereby affirmed.

Entered by Order of the Court.
/s/ JOHN P. HEHMAN
Clerk

APPENDIX J

Title 28, United States Code, Section 2254(d) (relevant provisions)

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant, for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

* * * * *

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[redacted]

FILED

[redacted]

[redacted]

[redacted]

JAMES SALEM,

Petitioner,

-vs-

RALPH KINDER, Sheriff
CUYAHOGA COUNTY

Respondent.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	
I. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH UNIFORMLY INTERPRET THIS COURT'S OPINION IN *NEIL v. BIGGERS*, 409 U.S. 188 (1972)	3
II. THIS COURT HAS CLEARLY DEFINED THE POINT IN TIME AT WHICH AN ACCUSED'S CONSTITUTIONAL RIGHT TO COUNSEL ATTACHES	7
III. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT	10
A. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISIONS OF THIS COURT CONCERNING EVIDENTIARY HEARINGS	10
B. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISION OF THIS COURT IN *NEIL v. BIGGERS*, 409 U.S. 188 (1972)	12
CONCLUSION	13
Appendix A	
Title 28, United States Code, Section 2241 (c) (3)	14

TABLE OF AUTHORITIES

Page

Baker v. Hocker,
496 F. 2d 615 (9th Cir., 1974) 6

Coleman v. Alabama,
399 U.S. 1 (1970) 4

Foster v. California,
394 U.S. 440 (1969) 4

Gilbert v. California,
388 U.S. 263 (1967) 8

Haskins v. United States,
433 F. 2d 836 (10th Cir., 1970) 6

Hastings v. Cardwell,
480 F. 2d 1202 (6th Cir., 1973),
cert. denied, 415 U.S. 923 (1974) 6

Kirby v. Illinois,
406 U.S. 682 (1972) 8, 9, 10, 13

LaVallee v. Delle Rose,
410 U.S. 690 (1973) 12

Neil v. Biggers,
409 U.S. 188 (1972) 3, 4, 5, 6, 7, 11, 12, 13

Rogers v. Peck,
199 U.S. 425 (1905) 12

Simmons v. United States,
390 U.S. 377 (1968) 5

Smith v. Coiner,
473 F. 2d 877 (4th Cir., 1973),
cert. denied, 414 U.S. 1115 6

Page

Stanley v. Cox,
486 F. 2d 48 (4th Cir., 1973),
cert. denied, 416 U.S. 958 7

State v. Lathan,
30 Ohio St. 2d 92 (1972) 12

Stovall v. Denno,
388 U.S. 293 (1967) 3, 4, 5, 6, 7, 11, 13

Townsend v. Sain,
372 U.S. 293 (1963) 10

United States ex rel Cannon v. Montanye,
486 F. 2d 263 (2nd Cir., 1973),
cert. denied, 416 U.S. 962 (1974) 6

United States ex rel Kirby v. Sturges,
510 F. 2d 397 (7th Cir., 1975),
cert. denied, 95 S. Ct. 2424 6

United States ex rel Pierce v. Cannon,
508 F 2d 197 (4th Cir., 1974) 6, 7

United States v. Cooper,
472 F. 2d 64 (5th Cir., 1973)
cert. denied, 414 U.S. 840 6

United States v. Hurt,
476 F. 2d 1164 (D.C. Cir., 1973) 6

United States v. Wade,
388 U.S. 218 (1967) 8, 9

STATUTES

UNITED STATES CODE, Title 28
Section 2254 (d) (1) 1, 10, 11
Section 2241 (c) (3) 1, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-112

JAMES SALER,

Petitioner,

- vs -

RALPH KREIGER, Sheriff
CUYAHOGA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES INVOLVED

The pertinent provisions of Title 28, United States Code, §2241 (c) are reproduced as Appendix A. The pertinent provisions of Title 28, United States Code §2254 (d) have been reproduced as petitioner's Appendix J.

STATEMENT OF THE CASE

Respondent substantially agrees with the statement of the case as submitted by petitioner. In addition to petitioner's statement of facts it is pertinent to note that the record shows that although there is testimony that the victim, Miss Hill, was very upset following the rape and was crying (R. 126, 211, 212) she readily answered questions when interviewed by police at the hospital (R. 267, 268). Furthermore, in addition to accurately describing her assailants to police at the hospital as both being white males, between twelve (12) and fifteen (15) years of age, one light haired and one dark haired (R. 113-115, 205, 214-215) she also described the type and color of clothing her assailants were wearing (R. 215, 216).

Significant also as stated by the district court below in its memorandum opinion and order (petition A 20, 21):

> "As indicated previously, the victim did not, as part of her direct examination, allude to her pre-trial identifications of petitioner. The prosecutor, however, referred to them in his opening statement (Tr. 25), and the direct testimony of one of the police officers included corroboration of these identifications. No objections were ever entered, however, either to the prosecutor's remarks, or the police officer's testimony. Petitioner's counsel, to the contrary, actively developed the record on these matters, and, in fact, first raised the pre-trial identifications as part of his cross-examination of the victim. Significantly, and as also noted earlier, the state trial court, who would have had to hear the evidence anyway if a proper motion had been made, viewed the pre-trial confrontations as constitutionally suspect."

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH UNIFORMLY INTERPRET THIS COURT'S OPINION IN *NEIL v. BIGGERS*, 409 U.S. 188 (1972).

This Court in *Stovall v. Denno*, 388 U.S. 293, 302 (1967), stated that due process is violated by a one-on-one pre-trial identification confrontation only when it is found to be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny the defendant due process of law. This claimed violation of due process of law must be assessed in light of "the totality of the circumstances" surrounding the confrontation. Nowhere in the *Stovall* decision was a suggestion made, as petitioner would have this Court find, that the suggestiveness of a pre-trial confrontation alone would require the exclusion of testimony concerning the out-of-court identification.

To the contrary, this Court in *Neil v. Biggers*, 409 U.S. 188, 198 (1972) emphasized that it is not the suggestiveness of a confrontation which violates the defendant's right to due process.

> "*It is the likelihood of misidentification which violates the defendant's right to due process*, and it is this which was the basis of the exclusion of evidence in Foster."
>
> (Emphasis Added)

The Court further stated that it was not suggestiveness but the "very substantial likelihood of irreparable mis-

identification" which was to be the standard for determining the admissibility of out-of-court *and* in-court identification testimony.

> "While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as the standard for the admissibility of testimony concerning the out-of-court identification itself."
>
> *Neil, supra,* at 198.

Neil traced the application of the "unnecessarily suggestive and conducive to irreparable mistaken identification" test from the "suggestive identification procedures", *Neil, supra,* at 196, found in *Stovall* to those in *Simmons v. United States,* 390 U.S. 377 (1968); *Foster v. California,* 394 U.S. 440 (1969); and *Coleman v. Alabama,* 399 U.S. 1 (1970). This Court found that each of these cases emphasized the necessity of balancing the suggestiveness of a confrontation against the likelihood of misidentification. The *Neil* Court further noted the expansion of the "totality of the circumstances" test from *Stovall* to *Simmons v. United States, supra.* In *Stovall, supra* at 302, the Court emphasizing the necessity for using a suggestive procedure as "the showing of *Stovall* to Mrs. Behrendt in an immediate hospital confrontation was imperative" focused solely on the circumstances surrounding the confrontation. In *Simmons, supra* at 385, the Court, finding no necessity for the suggestive photographic identification, emphasized its reliability based on the circumstances surrounding the crime. "The robbery took place in the afternoon in a well-lighted bank. The

robbers wore no masks. Five bank employees had been able to see the robber . . . for periods ranging up to five minutes."

While this Court noted that the district court in the *Neil* case had implied unnecessary suggestiveness alone required the exclusion of evidence, it declined to adopt it. Instead, consistent with its previous decisions, it weighed the totality of the circumstances surrounding both the identification by the witness at the time the criminal conduct occurred and the pre-trial confrontation in determining that the identification was reliable even though the confrontation procedure was suggestive.

Petitioner argues, however that

> "if pre-trial suggestive identification procedures and the trial of the defendant occur after the date *Stovall* was decided (the *Neil* trial occurring prior to *Stovall*) then due process requires the exclusion of testimony concerning the out-of-court identification; whether a defendant can prove that, notwithstanding such procedures, the identification is 'reliable' under the totality of the circumstances is irrelevant."
>
> (Petition, p. 10).

Petitioner's theory finds no support in case law. This Court in *Stovall* made no such distinction. And in *Neil*, the Court citing *Simmons* emphasized that the primary evil to be avoided in a pretrial confrontation is not the suggestiveness but "a very substantial likelihood of irreparable misidentification" and it was this standard which was to be used to determine the admissibility of out-of-court and in-court identification testimony. *Neil, supra*, at 198.

Federal courts of appeals have adopted this Court's emphasis on misidentification viewed in light of the totality of the circumstances as set forth in *Neil* and have applied the test uniformly to post-*Stovall* confrontations. See, *United States ex rel. Kirby v. Sturges,* 510 F. 2d 397 (7th Cir.), *cert. denied,* 95 S. Ct. 2424 (1975); *Baker v. Hocker,* 496 F. 2d 615 (9th Cir., 1974); *United States ex rel. Cannon v. Montanye,* 486 F. 2d 263 (2nd Cir., 1973), *cert. denied,* 416 U.S. 962 (1974); *Hastings v. Cardwell,* 480 F. 2d 1202 (6th Cir., 1973), *cert. denied,* 415 U.S. 923 (1974); *United States v. Hurt,* 476 F. 2d 1164 (D.C. Cir., 1973); *United States v. Cooper,* 472 F. 2d 64 (5th Cir.), *cert. denied,* 414 U.S. 840 (1973); *Haskins v. United States,* 433 F. 2d 836 (10th Cir., 1970). Furthermore, two circuits have stated that the Federal Constitution does not require the states to observe the exclusionary rule of evidence that petitioner recommends to-wit: unnecessary suggestiveness requires identification testimony stemming from the pre-trial confrontation to be *per se* excluded. *Kirby v. Sturges, supra; United States ex rel. Pierce v. Cannon,* 508 F. 2d 197 (4th Cir., 1974).

Petitioner states that the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decision on the same matter with the Fourth Circuit in *Smith v. Coiner,* 473 F. 2d 877 (4th Cir., 1973), *cert. denied,* 414 U.S. 1115. While the exact basis for the court's determination in *Smith v. Coiner, supra,* that the show-up in that case was unnecessarily suggestive and conducive to irreparable mistaken identification is not altogether clear, it is abundantly clear that the Fourth Circuit today embraces the *Neil* formulation that a constitutionally invalid identification confronta-

tion must be unnecessarily suggestive and, in addition, under the totality of the circumstances create a very substantial likelihood of irreparable mistaken identification. In *Pierce, supra,* at n. 11, the Fourth Circuit found the *Smith* distinction between pre-*Stovall* and post-*Stovall* cases without basis and out-of-line with a subsequent Fourth Circuit decision, *Stanley v. Cox,* 486 F. 2d 48 (4th Cir., 1973), *cert. denied,* 416 U.S. 958 (1973), as well as decisions rendered in the other circuits. Rather, the Court held that identification testimony was admissible even though there had been unnecessarily suggestive pre-trial post-Stovall confrontation where under the totality of the circumstances, the identification testimony was reliable.

Thus, respondent submits that there is no conflict among the circuits concerning the test to be applied to determine the constitutional validity of identification confrontation testimony. Rather, the circuits uniformly hold that a constitutionally invalid identification confrontation must be unnecessarily suggestive and, in addition under the totality of the circumstances as set forth in *Neil,* create a very substantial likelihood of irreparable misidentification. This was the standard applied by the district court below and affirmed by the Court of Appeals for the Sixth Circuit in finding that the victim's in-court identification was properly admitted into evidence.

II. THIS COURT HAS CLEARLY DEFINED THE POINT IN TIME AT WHICH AN ACCUSED'S CONSTITUTIONAL RIGHT TO COUNSEL ATTACHES.

As this Court announced in *Kirby v. Illinois*, 406 U.S. 682, 683 (1972), the decisions in the cases of *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) stand for the proposition,

> "that a *post indictment* pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." (Emphasis added)

In *Kirby* as in the case at bar, petitioner and a companion were arrested and taken to the police station. The victim of the crime was brought to the station to confront petitioner and his companion neither of whom were advised of the right to counsel nor who asked for or received legal assistance. This Court refused to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony arising from a police show-up which occurred after arrest but prior to the time the defendant had been formerly charged or indicted for a criminal offense. The court concluded:

> ". . . a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. (Citations omitted)
>
> 406 U.S. at 688.

Petitioner does not question that the Court's decision in *Kirby* limited application of the *per se* rule announced in *Gilbert* to the time when adversary judicial pro-

ceedings have been initiated against an accused (petition, p. 15) but contends that the decision does not specifically limit the Court's holding in *Wade* pertaining to the admissibility of in-court identification. However, it is clear that it was the Wade-Gilbert exclusionary rule holding that "no '*in-court* identifications' are admissible in evidence if their 'source' is a lineup conducted in violation of this constitutional standard" (after indictment and in the absence of counsel) (Emphasis Added), *Kirby, supra,* at 683. The Court declined to extend "to identification testimony based upon a police station show-up that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense". *Kirby, supra,* at 684.

Petitioner asks this Court to further define the point in time at which adversary judicial proceedings are initiated. Respondent submits that this Court has definitively settled this issue,

> "But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points in time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (Citations omitted)
>
> *Kirby, supra,* at 689.

As the District Court below found, (petition, p. A20)

> "There is no dispute that petitioner was without counsel at the time of the pre-trial identifications. It is clear, however, that these identifications took place almost immediately after petitioner's arrest, and before any formal charges were made against him."

Thus, as in *Kirby*, the pre-trial identifications here occurred during a routine police investigation and not at a critical stage of the prosecution.

III. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT.

A. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISIONS OF THIS COURT CONCERNING EVIDENTIARY HEARINGS.

28 U.S.C. Section 2254(d) provides in relevant part:

> "[A] Determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing . . . ."

In *Townsend v. Sain*, 372 U.S. 293, 314-315 (1963), the precursor of 28 U.S.C. Section 2254(d), this Court set forth the general standards governing the holding of hearings on federal habeas petitions stating:

> "[T]he possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the

> state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied."

In the instant case, not only is there no evidence that the State trial judge sitting in his dual capacity of finder of fact and arbiter of the law utilized the wrong standard, but there is every indication he applied the correct standards. He determined, based upon an assessment of the totality of the circumstances

> ". . . . the court is not overly fond of the confrontation method used by the police in their desire to either implicate or let go . . .
>
> * * * * *
>
> . . . . the in-court identification is not tainted by the confrontation, that the identification was independent of the confrontation caused by the police department." (Petition, p. A4).

Although the conclusions of the State trial court were not couched in the exact legal terminology used in *Stovall* and *Neil*, respondent submits that the trial court in actuality found, based upon the totality of the circumstances, that the pre-trial confrontation was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to render inadmissible the victim's in-court identification. Thus, the trial court applied the correct federal constitutional standards.

The District Court in reviewing the two volume transcript of the trial proceedings applied the same constitutional standards and arrived at the same conclusion. Respondent therefore submits that since the opinion of the state trial court met the requirements of 28 U.S.C. Section 2254(d)(1) the burden was thus on petitioner

to establish in the District Court by convincing evidence that the state court's determination was erroneous before being entitled to an evidentiary hearing. *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973). This petitioner failed to do.

For the foregoing reasons, respondent submits that petitioner was not entitled to an evidentiary hearing in the district court.

Petitioner cites for the first time in federal court the Ohio case of *State v. Lathan*, 30 Ohio St. 2d 92 (1972) for the proposition that at the time of the trial court's ruling in this case a defendant in an Ohio criminal proceeding had the right to the assistance of counsel at a pre-trial confrontation whether or not such confrontation preceded formal judicial proceedings. Respondent notes initially that *State v. Lathan, supra,* was not the law at the time of petitioner's trial, that case having been decided May 10, 1972, two (2) days after petitioner had been convicted and sentenced. (Petition, p. 4). Furthermore, under the facts of this case, the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws or treaties of the United States. Title 28 U.S.C. Section 2241(c)(3) (Appendix A, p. 14). It has long been decided that federal courts will not interfere by habeas corpus with a state's administration of its criminal law, unless fundamental rights specially secured by the federal Constitution are invaded. *Rogers v. Peck*, 199 U.S. 425 (1905).

B. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISION OF THIS COURT IN *NEIL V. BIGGERS*, 409 U.S. 188 (1972).

As stated in Argument I, the admissibility of the in-court identification evidence was properly assessed in terms of the totality of the circumstances and the Court of Appeals below correctly affirmed the District Court's conclusion that the pre-trial confrontations did not give rise to such a danger of irreparable mistaken identification as to require the exclusion of the victim's eye-witness testimony. Accordingly, the victim's in-court identification was properly admitted in evidence.

CONCLUSION

No conflict exists among the United States Courts of Appeals as to the interpretation of this Court's decisions in *Stovall v. Denno* and *Neil v. Biggers*. Additionally, the Sixth Circuit below correctly decided that petitioner was not entitled to counsel at the time of the pre-trial confrontation basing its decision on the standards set down in *Kirby v. Illinois*. Furthermore, the Sixth Circuit, using the decisions of this Court as guidelines, correctly determined that petitioner was not entitled to an evidentiary hearing and that the victim's in-court identification was properly admitted into evidence. Wherefore, respondent prays that the petition for a writ of certiorari filed herein be denied.

Respectfully submitted,

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APPENDIX A

Title 28, United States Code, Section 2241(c).

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.